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No. 88-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RUSKIN HARDWARE, INC., SINGER JEWELRY, INC., SAMUEL R. SCARCELLO AND THE DRUG STORE, INC.,
Petitioners,

v.

FLEMING COMPANIES, INC.,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Eighth Circuit properly affirmed the trial court's dismissal of plaintiffs' antitrust claims for lack of antitrust standing.

Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 537-45 (1983)

Blue Shield of Virginia v. McCready, 457 U.S. 465, 483 (1982)

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487-88 (1977)

Henke Enterprises, Inc. v. Hy-Vee Food Stores, Inc., 749 F.2d 488 (8th Cir. 1984)

2. Whether the United States Court of Appeals for the Eighth Circuit properly affirmed the order of the trial court granting summary judgment to Fleming because plaintiffs failed to make a sufficient showing on essential elements of their prima facie tort and tortious interference claims.

Celotex Corp. v. Catrett, 477 U.S. 371, 323-24 (1986)

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October Term, 1988

RUSKIN HARDWARE, INC., et al.,

Petitioners,

v.

FLEMING COMPANIES, INC.,

Respondent.

BRIEF IN OPPOSITION

The respondent, Fleming Companies, Inc. ("Fleming")[1], respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's June 16, 1988, opinion in this case.

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are set forth in full in Fleming's Appendix.

STATEMENT OF THE CASE

A. Procedural History

Plaintiffs/petitioners ("plaintiffs"), some of the lessees of the Ruskin Heights Shopping Center in Kansas City, Missouri, sued the defendant/respondent, Fleming, another

[1] Pursuant to Rule 28.1 of the Supreme Court Rules, Fleming Companies, Inc. has no parent company, and all subsidiaries are wholly owned. The companies listed at A18 are local grocery stores in which Fleming shares equity ownership with the local owner.

lessee of the same center, in two separate lawsuits complaining that plaintiffs were injured because Fleming closed and did not reopen a grocery store in the premises leased to Fleming. Plaintiffs' damages were alleged to have resulted from diminished traffic at the shopping center following the grocery store closing. (A. 3).[2] Case No. 86-0161 was originally filed February 6, 1986, in the United States District Court for the Western District of Missouri, Western Division, and purported to state claims under the Sherman Act, 15 U.S.C. §§ 1 and 2. Case No. 86-0371 was a case originally filed February 6, 1986, in state court which was removed to federal court by Fleming in which plaintiffs alleged state antitrust and common law claims against Fleming. The two actions were consolidated April 5, 1986. (A. 6).

On May 8, 1986, the trial court dismissed all counts in Case No. 86-0161 (Sherman Act) and Counts I and II in Case No. 86-0371 (Missouri antitrust claims) having found that plaintiffs lacked antitrust standing to bring these claims. (A. 9).

On July 17, 1986 and April 2, 1987, upon motions by each of the parties, the trial court ordered that six of the original ten plaintiffs be dropped as plaintiffs from this action. The plaintiffs remaining in this case were The Drug Store, Inc., Singer Jewelry, Inc., Samuel R. Scarcello, and Ruskin Hardware, Inc.

On October 14, 1986, Fleming moved for summary judgment in its favor on plaintiffs' tortious interference and prima facie tort claims, contending that there were no genuine issues as to certain material facts as a result of which Fleming was entitled to judgment as a matter of law. On April 27, 1987, the trial court granted Fleming's Motion for Summary

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[2]Although plaintiffs alleged damages, interrogatory answers show that sales or profits for all but one plaintiff actually increased after the grocery store closing.

Judgment on both claims because plaintiffs failed to carry their burden of proof that Fleming lacked justification for its actions, which is a necessary element of both plaintiffs' prima facie tort claim and tortious interference claim. (A. 16). The trial court ruled that an additional reason for granting summary judgment on plaintiffs' prima facie tort claim was that plaintiffs failed to produce any evidence whatever on the necessary element that Fleming intentionally acted to injure plaintiffs. (A. 17).

Plaintiffs appealed both the order dismissing their antitrust claims for lack of antitrust standing and the order granting summary judgment for Fleming on plaintiffs' prima facie tort and tortious interference claims. On June 16, 1988, the United States Court of Appeals for the Eighth Circuit filed an opinion in which it affirmed both of the orders of the trial court. (A. 1-4).

B. Statement of Facts

Fleming, a wholesale grocery supplier, leases from a partnership, known as Ruskin Heights Associates, certain premises located in the Ruskin Heights Shopping Center, Kansas City, Missouri. (A. 2). Fleming obtained rights as lessee under the lease in March, 1982, by assignment from the Great Atlantic & Pacific Tea Company ("A&P") as part of a package of stores in the Kansas City area purchased from A&P. (A. 2).

In the course of deciding to acquire the package of stores, Fleming decided to close the former A&P grocery store in Ruskin Heights because it was in Fleming's economic interest

to do so. (A. 11-12).[3] Fleming continues to pay rent required by the lease and has always abided by all of the terms of the lease. The lease does not require the conduct of any business at the location leased. (A. 11). Under the terms of the lease, Fleming is not obligated to keep an operating tenant in the leased premises. (A. 15). Nevertheless, since Fleming acquired the lease it has continuously sought to sublease the premises to an ongoing business. (A. 12).[4] In all of its dealing with the leased premises, Fleming's only objective has been, and remains, to maximize the profit that it can obtain from the lease. (A. 11-12).

The plaintiffs are also tenants in the Ruskin Heights Shopping Center. The plaintiffs operate a drug store, a jewelry store, a barber shop, and a hardware store; none of the plaintiffs are competitors, participants or consumers within the retail grocery market. (A. 3). Fleming has never intended to cause injury to the plaintiffs or any of the other tenants of the Ruskin Heights Shopping Center. (A. 17).

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[3] There is no evidence to support the assertions of plaintiffs at pages 9, 10 and 18 of the Petition that Fleming closed the store because it chose to deal only with the United Super in Longview or that Fleming placed a sign on the closed store directing customers to the Longview Shopping Center. The undisputed evidence shows that Fleming closed this store because this store would cause Fleming to lose money if it stayed open. (A. 12).

[4] Plaintiffs state at pages 9, 10 and 18 of the Petition that Fleming has refused to allow a competing magnet tenant in the premises or that Fleming has "blocked the use of the Ruskin Heights facility." In fact, the undisputed evidence shows that Fleming has continuously tried to sublease the premises to a suitable subtenant, (A. 12), and has succeeded in subleasing the premises during much of the period since it obtained the lease. Contrary to plaintiffs' assertion, there was never a legitimate offer from the lessor to pay Fleming $150,000 if Fleming would agree to surrender the lease.

REASONS FOR DENYING THE WRIT

PROPOSITION I: IN THE PETITION, PLAINTIFFS HAVE PRESENTED NEW ARGUMENTS AND HAVE IGNORED RELEVANT PRECEDENT.

In their Petition for a Writ of Certiorari (the "Petition"), plaintiffs have raised new arguments that have never before been presented in this case and have ignored precedent directly relevant to the questions presented by plaintiffs for review. First, in contending that the Court of Appeals erred in affirming the trial court's dismissal of plaintiffs' antitrust claims for lack of antitrust standing, plaintiffs argue for the first time in the Petition that the Complaint alleged that the relevant market was "consumer traffic for shopping centers," (Petition p. 13), or "a cluster of goods and services," (Petition p. 11).[5] Plaintiffs then argue that this legal conclusion, which they now claim is somewhere in the Complaint, gave them standing to bring their antitrust claims. Plaintiffs argue that the trial court and Court of Appeals were required to accept as true their new characterization of the relevant market.

In *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968), *cert. den.* 395 U.S. 961 (1969), the court stated that "in testing the legal sufficiency of the Complaint the well-pleaded allegations are taken as admitted but conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted." (Citing 2 *Moore's Federal Practice* § 12.08, p. 2244). Although plaintiffs now conclude that the relevant market involved in this case is "consumer traffic for shopping centers," the facts pleaded do not support plaintiffs' conclusion.

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[5] Plaintiffs argued to the Court of Appeals that the relevant market was "attraction of customers." (A. 4).

In their Petition, plaintiffs fail to cite *Henke Enterprises, Inc. v. Hy-Vee Food Stores, Inc.*, 749 F.2d 488 (8th Cir. 1984), a decision from the Court of Appeals that addressed an almost identical factual situation and the same legal question as the one in the instant case. Plaintiffs cannot distinguish their case from *Henke* by placing a different label on the relevant market. As the Court of Appeals stated:

> The plaintiffs try to distinguish *Henke Enterprises, Inc.* by arguing the relevant market here was the "attraction of customers." The plaintiffs, however, refer to no persuasive authority to support their broad definition of the relevant market. In addition, if this court were to accept the plaintiffs' market definition, we would expand the scope of the private antitrust action far beyond its intended bounds. A private antitrust action is not available to remedy every injury suffered by a player in the general economy. *See Associated Gen. Contractors*, 459 U.S. at 535-36. Rather, to maintain a private antitrust action, a party's claimed injury must be sufficiently linked to the procompetitive policies underlying the antitrust laws. *See Henke Enterprises, Inc.* 749 F.2d at 490; see also *Id.* at 489-90.

(A. 4).

Further, plaintiffs argue at page 17 of the Petition that by assuming the lease of the "anchor store" Fleming acquired monopoly power in the relevant product and geographic market. According to plaintiffs' theory, all lessees of stores in all shopping centers are monopolists, because only the lessee has "monopoly power" over the leased premises. The Court of Appeals correctly affirmed the trial court's ruling that Fleming's motion to dismiss was governed by *Henke* and that plaintiffs lack antitrust standing.

Plaintiffs also argue in the Petition that the Court of Appeals erred in affirming the trial court's order granting summary judgment for Fleming on plaintiffs' tortious interference and prima facie tort claims.[6] But in the Petition plaintiffs fail to cite, much less distinguish, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), a case that requires a plaintiff to go beyond pleadings and produce sufficient admissible evidence on the essential elements of a case in order to effectively oppose a motion for summary judgment. The Court of Appeals affirmed, (A. 4), the trial court's ruling, (A. 16), that plaintiffs failed to carry their burden of proof that Fleming lacked justification for its actions (lack of justification being a necessary element of plaintiffs' tortious interference and prima facie tort claims), and that plaintiffs failed to produce any evidence whatever that Fleming intentionally acted to injure them, (A. 17), (a necessary element of plaintiffs' prima facie tort claim). Although the trial court had serious doubts about other elements of plaintiffs' case, it addressed only the above elements because plaintiffs' inability to prove them spelled failure for their entire case. (A. 15).

Even though Fleming produced undisputed evidence that it has always abided by all of the terms of its lease, that it closed the former A&P grocery store in the Ruskin Heights Shopping Center because it would have lost money faster if it had left it open, (A. 12), and that it has continuously attempted to sublease the space in the Ruskin Heights Shopping Center but has been unable to do so, (A. 12), plaintiffs

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[6] At pages 24-25 of the Petition, plaintiffs cite *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), for the proposition that courts should exercise caution in the use of summary judgment in complex antitrust cases. Of course, in the instant case, which is not complex, summary judgment was not granted on plaintiffs' antitrust claims — only on plaintiffs' state law tort claims. Plaintiffs' antitrust claims were dismissed.

recite "facts" that have no basis and argue in the Petition that the Court of Appeals erred in affirming the trial court's finding that plaintiffs failed to carry their burden of showing that Fleming's acts were not justified. In their Petition, plaintiffs discuss "evidence" and make questionable legal conclusions that they say show that Fleming's conduct was improper. However, the trial court considered plaintiffs' "evidence" and found that "there is a complete lack of evidence of such [improper] behavior in this case." (A. 16).

The Petition does not address the trial court's finding that plaintiffs failed to produce any evidence that Fleming intended to harm plaintiffs, which is a necessary element of their prima facie tort claim.

As will be discussed in more detail below, the Court of Appeals correctly affirmed the trial court's order granting Fleming's motion to dismiss and its finding that the evidence is so one-sided in this case as to require that Fleming prevail on its motion for summary judgment. (A. 1-4).

PROPOSITION II. PLAINTIFFS STATE NO GROUNDS UPON WHICH A WRIT OF CERTIORARI MAY BE GRANTED.

Rule 17 of the Supreme Court Rules outlines the general considerations governing the grant or denial of a petition for writ of certiorari. Rule 17.1 states, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." As noted in Rule 17, such special and important considerations may be a conflict in decisions rendered by federal courts of appeals, *Donaldson v. United States*, 400 U.S. 517, 522 (1971), a conflict in decisions rendered by a federal court of appeals and the United States Supreme Court, *Egan v. City of Aurora*, 365 U.S. 514, 515 (1961), or

important issues that have not been addressed by the Court, *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

In the present case, the plaintiffs have not and cannot establish any traditional grounds upon which their Petition can be granted. The Court of Appeals' decision from which plaintiffs seek relief is based upon the decisions of this Court and is consistent with the decisions of other federal courts of appeals and federal district courts which have addressed the issue of standing in similar factual circumstances.

Although this Court has not decided a case involving antitrust standing in a context identical to the present situation, the decision by the Court of Appeals in this case is entirely consistent with earlier decisions of this Court which state the rules for determining standing in private antitrust cases. *See, Associated General Contractors*, 459 U.S. 519, 537-45 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483 (1982); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977).

The decision in this case does not conflict with decisions of other courts. Standing has consistently been denied litigants who, like the plaintiffs in this case, fail to show that their injury is the type Congress intended "to redress in providing a private remedy for violations of the antitrust laws." *McCready*, 457 U.S. at 483. *See, Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983); *Quality Foods v. Latin Am. Agribusiness Development*, 711 F.2d 989 (11th Cir. 1983); *Rosenberg v. Cleary, Gottlieb, Steen & Hamilton*, 598 F. Supp. 642 (S.D. N.Y. 1984).

No "special and important reasons" exist in this case for this Court to grant plaintiffs' Petition. There is no conflict between the circuit courts of appeals, no conflict between the Eighth Circuit's decision and a decision by this Court, and there is no new issue of law presented by this case that

has not been thoroughly discussed by this Court. Therefore, there is no need for this Court to review the Eighth Circuit's decision in this case and the plaintiffs' petition for writ of certiorari should be denied.

PROPOSITION III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE ORDER OF THE TRIAL COURT DISMISSING PLAINTIFFS' ANTITRUST CLAIMS BECAUSE PLAINTIFFS LACK ANTITRUST STANDING.

The first order from which plaintiffs seek relief is the order granting Fleming's motion to dismiss plaintiffs' federal and state antitrust claims. (A. 5-9). The trial court ruled that the motion to dismiss is governed by the Court of Appeal's decision in *Henke Enterprises, Inc. v. Hy-Vee Food Stores, Inc.*, 749 F.2d 488 (8th Cir. 1984), a "decision [that] addressed an almost identical factual situation," and which applied the law on antitrust standing which was set forth by this Court in *Associated General Contractors.* (A. 7).

In *Henke*, the Court of Appeals noted that the Sherman Act was enacted in order to protect "the economic freedom of participants in the relevant market." *Henke* at 489 (citing *Associated General Contractors*, 459 U.S. at 538).

> Thus, to maintain a private antitrust action, a party must do more than claim improper motive and some causal connection between its injury and the defendant's activity. Rather, the party must demonstrate that it has suffered the type of injury Congress has intended "to redress in providing a private remedy for violations of the antitrust laws."

Id. (citing *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483 (1982)). "Such a showing may be made if the injury suffered by the party is 'inextricably intertwined with the

injury the conspirators sought to inflict on . . . the . . . [relevant] market.' " *Id.* (citing *McCready*, 457 U.S. at 484).

In *Henke*, the plaintiff, Henke Enterprises, Inc. ("Henke"), operated a hardware store in a small shopping center. Prior to November, 1979, defendant Hy-Vee Food Stores, Inc. ("Hy-Vee") operated a grocery store in the same shopping center. This grocery store was the "anchor" tenant of and attracted many customers to the shopping center. Henke claimed that it had relied on the grocery store as an important source of customers.

In December, 1979, Hy-Vee decided to close its grocery store and move to another shopping center. After the grocery store closed, Henke, which was the center's only remaining tenant, suffered a 50% loss of business. When no anchor tenant replaced Hy-Vee, the hardware store relocated in the space formerly occupied by Hy-Vee. The move proved unsuccessful and in January, 1981, after suffering severe losses, Henke closed the hardware store.

Henke contended that Hy-Vee's actions had *prevented other food stores* from locating in the shopping center and thus constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. Henke further contended that these actions effectively destroyed the shopping center and that, as the remaining tenant of the center, it was the party most directly injured by the actions.

The issue on appeal was whether Henke had standing to bring an antitrust action. The Court of Appeals concluded that Henke, although injured, had not suffered the type of injury that the antitrust laws were intended to prevent.

> Unlike the plaintiff in *McCready* who was a consumer within the market affected by the anticompetitive activity, Henke's hardware store was neither a competitor,

> participant, nor consumer within the retail grocery market. Rather, the only significant connection between Henke's hardware store and Hy-Vee's grocery store was one of proximity. Further, although the harm suffered by Henke may have been an incidental by-product of the conspirators' claimed anticompetitive action, it was neither a "necessary step" nor an "integral . . . aspect" of a conspiracy to restrain the retail grocery market. Hence Henke's injury was not inextricably intertwined with the injury inflicted on the retail grocery market.

Henke at 489-90 (citing *McCready*, 457 U.S. at 479). The Court of Appeals concluded that the injury suffered by Henke, although arguably caused by defendants' actions, was not linked sufficiently to the procompetitive policy underlying the antitrust laws and was not antitrust-type injury. *Id.* at 490 (citing *Brunswick*, 429 U.S. at 487-88).

The Court of Appeals added that

> [e]ven if Henke had suffered antitrust injury, the presence of more directly affected parties such as the various competitors, consumers, and participants within the retail grocery market "diminishes the justification for allowing a more remote party such as . . . [Henke] to perform the office of a private attorney general." *Associated General*, 459 U.S. at 542 (footnote omitted). Further, the extent to which Henke's damages were related to Hy-Vee's claimed anticompetitive activity was too speculative and uncertain to confer standing. In large part, Henke relied on decreased consumer interest in the 22nd Street Shopping Center as a basis for its losses. To determine the extent to which Hy-Vee's activity caused this decrease, however, "would necessitate wide ranging speculation, particularly since diminished consumer activity at any given shopping area could result from

> myriad independent reasons unrelated to the alleged antitrust violation." *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1088 (6th Cir. 1983) (footnote omitted).

Id.

Given the lack of antitrust-type injury, the presence of more appropriate parties, and the speculative nature of Henke's injury, the Court of Appeals concluded that Henke was not an appropriate party to maintain that antitrust action. The Court of Appeals therefore affirmed the district court's dismissal of the action.

In the instant case, the Court of Appeals agreed with the trial court's ruling that the facts in the instant case are almost identical to those in *Henke* and that plaintiffs do not have standing to bring their antitrust claims. As in *Henke*, plaintiffs in the instant case are not competitors, participants or consumers within the grocery business. (A. 3). The only significant connection between the plaintiff-tenants and the former A&P store is one of proximity. The Court of Appeals and the trial court properly concluded that *Henke* is dispositive of plaintiffs' Sherman Act claims and these claims should be dismissed. (A. 4).

The rulings of the lower courts are correct. This Court should deny the Petitioners' request for a writ of certiorari.

PROPOSITION IV: THE COURT OF APPEALS CORRECTLY AFFIRMED THE ORDER OF THE TRIAL COURT GRANTING SUMMARY JUDGMENT FOR FLEMING ON PLAINTIFFS' TORTIOUS INTERFERENCE WITH CONTRACT AND PRIMA FACIE TORT CLAIMS.

The Court of Appeals properly affirmed the order of the trial court granting summary judgment to Fleming on plain-

tiffs' state law tort claims because the plaintiffs failed to go beyond their pleadings and designate facts necessary to make a sufficient showing on the elements of their case. The Court of Appeals and trial court properly applied the standards for summary judgment which have recently been elucidated by this Court:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

> In essence . . . the inquiry . . . [is] whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Id. at 251-52.

> The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

> Such a . . . [showing] . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Id. at 324.

In considering the facts and arguments of the parties in light of these standards, the Court of Appeals properly affirmed the trial court's ruling that the evidence is so one-sided in this case as to require that Fleming prevail.

A. Tortious Interference with Contract, Business Relationship or Expectancy

The elements which plaintiffs were required to prove in order to succeed on their claim of tortious interference are (1) a contract, or valid business relationship or expectancy; (2) defendant's knowledge of the contract or relationship; (3) intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; (5) damages resulting from defendant's acts. *Institutional Food Marketing Associates, Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448 (8th Cir. 1984) (construing Missouri law). (A. 15). Although the trial court had serious doubts about other elements of plaintiffs' case, it addressed only the issue of justification, because the lack of evidence as to that element alone spelled failure for the entire theory. (A. 15).[7]

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[7] The trial court stated: "For instance, given the fact that the relationship between each of the plaintiffs and their landlord-lessor was governed by contract, none of which provided for the continuous presence of an anchor tenant, the court questions whether plaintiffs' alleged expectation that such a tenant would always remain rose to the level of a valid expectation which the law would protect. While it is true that relationships may be protected in the absence of a contract, it is presumed that where a contract does exist, its terms will contain all the duties and benefits obtaining between the parties." (A. 15).

As the trial court held,

> The burden of proving an absence of justification is borne by plaintiff. *Francisco v. Kansas City Star Co.*, 629 S.W.2d 524 (Mo. Ct. App. 1981). These plaintiffs do not contest defendant's factual claim that it acted in its own financial interests but argue that this motive cannot provide a basis for a finding of justification.
>
> Plaintiffs' argument that defendant's acts were unjustified because they violated the Sherman Antitrust Act must be rejected. Plaintiffs' claims based on antitrust violations were dismissed from this suit and clearly cannot be determined on this motion. Thus, they cannot serve as a basis for a claimed lack of justification.
>
> Plaintiffs' argument that defendant's acts must be judged objectively, so as to coincide with society's best interests, is without merit. Missouri courts have held that "where one has a bona fide legal economic interest to protect, that party is privileged to prevent performance of a contract which threatens that bona fide legal economic interest." *Francisco*, 629 S.W.2d at 534; *Salomon v. Crown Life Insurance Co.*, 536 F.2d 1233 (8th Cir. 1976), *cert. denied*, 429 U.S. 961 (1976); *see also Minnesota Mining & Manufacturing Co. v. Williamson*, 675 S.W.2d 951 (Mo. Ct. App. 1984); *Pillow v. General American Life Insurance Co.*, 564 S.W.2d 276, 282 (Mo. Ct. App. 1978). While the law recognizes an exception to this rule for behavior that is inherently improper, there is a complete lack of evidence of such behavior in this case. Defendant was performing according to the terms of its own lease, which specifically allowed it to keep the premises vacant. Plaintiffs have failed to carry their burden of proof as to this necessary element of their cause of action for

tortious interference with contract or business relationship.

(A. 16).[8]

The Court of Appeals reviewed the record and the applicable legal principles and correctly concluded that the trial court properly granted summary judgment in favor of Fleming on plaintiffs' tortious interference claim.

B. Prima Facie Tort

The Court of Appeals correctly affirmed the trial court's order granting summary judgment on plaintiffs' claim of prima facie tort. The elements of this claim are (1) an intentional lawful act by defendant; (2) defendant's intent to cause injury to plaintiff; (3) actual injury to plaintiff; (4) absence of any justification or insufficient justification for defendant's act. *Porter v. Crawford & Co.*, 611 S.W.2d 265 (Mo. Ct. App. 1980). (A. 16). The trial court ruled that plaintiffs failed to carry their burden of proof on the elements of intent and justification.

The key element of prima facie tort is an intent to cause injury to the plaintiff. Proof that defendant intentionally did the lawful act in question, even if accompanied by proof that plaintiff was injured thereby and that there was an absence of justification for defendant's act, does not make a submissable

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[8] At page 22 of the Petition, plaintiffs cite *Briner Electric Co. v. Sachs Electric Co.*, 680 S.W.2d 737, 741 (Mo. Ct. App. 1984), for the proposition that under the law of Missouri, anticompetitive conduct negates justification. The holding in *Briner* is inapplicable to the instant case. First, plaintiffs in the instant case offered no proof of anticompetitive conduct. Second, *Briner* deals with tortious interference with one who is a *competitor*. In the instant case, plaintiffs are not *competitors* of Fleming.

case. "Plaintiff carries an additional burden, albeit a heavy one to shoulder, of proving an 'actual intent' on defendant's part to *injure* plaintiff, not merely an intent to do the act purportedly resulting in the claimed injury." *Lundberg v. Prudential Insurance Company of America*, 661 S.W.2d 667, 670 (Mo. Ct. App. 1983).

As the trial court held,

> although, as plaintiffs suggest, intent may sometimes be inferred from the fact that a tortfeasor is held to account for the natural and probable consequences of his actions, Missouri law as to this particular tort is to the contrary; the intent must be specific. *Rooney v. National Super Markets, Inc.*, 668 S.W.2d 649 (Mo. Ct. App. 1984); *Bandag of Springfield, Inc. v. Bandag, Inc.*, 662 S.W.2d 546 (Mo. Ct. App. 1983) ("Inasmuch as the record shows beyond cavil that the defendant had only a profit motive . . . the element of intentionally seeking to injure plaintiffs, essential to a cause of action for prima facie tort, is lacking.").

(A. 17).

Plaintiffs admitted in their depositions that they have no evidence that Fleming intended to harm their businesses. It is understandable that the evidence shows that Fleming did not intend to harm plaintiffs by any of its actions. (A. 17). It is hard to imagine any reason why Fleming, a wholesale grocery supplier, would want to harm a drug store, jewelry store, barber shop, or hardware store.

The trial court also held that plaintiffs failed to carry their burden of proof to show that Fleming was not justified in its actions. Fleming is justified under its lease to keep the premises vacant, and is not required to operate a business to risk losing still more money to please plaintiffs. In addition,

Fleming's actions were justified because they were undertaken to protect a valid economic interest.

The Court of Appeals reviewed the record and the applicable legal principles and correctly concluded that the trial court properly granted summary judgment in favor of Fleming on plaintiffs' prima facie tort claim.

CONCLUSION

Based upon the above and foregoing authorities, the respondent, Fleming Companies, Inc., respectfully requests that the Court deny the Petitioners' request for a writ of certiorari.

Respectfully submitted,

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APPENDIX

(Filed June 16, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1775

Alpha Shoe Service, Leroy E. Kendricks d/b/a Alpha Shoe Service; The Drug Store, Inc. d/b/a The Drug Store; Singer Jewelry, Inc. d/b/a Singer Jewelry; Ruskin Heights Barber Shop, Samuel R. Scarcello d/b/a Ruskin Heights Barber Shop; Ruskin Hardware, Inc. d/b/a Ruskin Sentry Hardware,

Appellants,

v.

Fleming Companies, Inc.,

Appellee,

Melva Carter d/b/a Ruskin Center Salon,

Appellant,

v.

Fleming Companies, Inc.,

Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: March 17, 1988
Filed: June 16, 1988

Before FAGG, Circuit Judge, WRIGHT,* Senior Circuit Judge, and MAGILL, Circuit Judge.

PER CURIAM.

Plaintiffs, tenants of Ruskin Heights Shopping Center (Ruskin Center) located in Kansas City, Missouri, appeal from two adverse decisions of the district court. The court first dismissed the plaintiffs' federal and state antitrust claims against the defendant, Fleming Companies, Inc. (Fleming), an Oklahoma corporation and wholesale grocery supplier. The court later granted summary judgment in favor of Fleming on the plaintiffs' state tort claims. We affirm the district court in all respects.

Until 1982 the Great Atlantic and Pacific Tea Company (A&P) operated a grocery store in the anchor location of Ruskin Center. During the same period, Fleming supplied products to a competing grocery store that was the anchor tenant at Longview Shopping Center (Longview Center). Longview Center was located only four blocks from Ruskin Center. Through the purchase of several A&P grocery stores, Fleming became the assignee of the lease for the anchor tenant space in Ruskin Center. After the lease assignment, Fleming closed the A&P store in Ruskin Center and left the space empty. Fleming also placed a sign on the door of the former A&P store that directed consumers to the grocery store at Longview Center.

When Fleming did not fill the leased space with another anchor tenant, the plaintiffs sued. They asserted federal and state antitrust violations, *see* Sherman Act, 15 U.S.C. §§ 1, 2; Mo. Ann. Stat. § 416.031 (Vernon 1979), and, in addition,

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* The HONORABLE EUGENE A. WRIGHT, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

several state tort claims. Specifically, the plaintiffs maintained they were injured by Fleming because it kept the anchor tenant location empty for an extended period of time. According to the plaintiffs, the absence of an anchor tenant in Ruskin Center resulted in diminished consumer traffic at the shopping center and thus less business for them.

Fleming responded by filing a motion to dismiss the antitrust claims, and the district court granted the motion. The court concluded that under *Henke Enterprises, Inc. v. Hy-Vee Food Stores, Inc.*, 749 F.2d 488 (8th Cir. 1984), the plaintiffs lacked standing to sue based on the federal antitrust laws. Similarly, the plaintiffs lacked standing to sue on their state antitrust claims because Missouri intended that its antitrust laws be construed in harmony with federal antitrust statutes. *See* Mo. Ann. Stat. § 416.141 (Vernon 1979).

Fleming also filed a motion for summary judgment on the plaintiffs' tort claims. The court granted this motion after determining that the plaintiffs had failed to make a sufficient showing on essential elements in their causes of action. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Plaintiffs now appeal from both district court determinations.

We first address the issue whether plaintiffs have standing to bring a private action under the federal antitrust laws. *See* 15 U.S.C. § 15. Congress enacted "[t]he Sherman Act * * * to protect 'the economic freedom of participants in the relevant market.'" *Henke Enters., Inc.*, 749 F.2nd at 489 (quoting *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983) (footnote omitted)). Here, Fleming's activities occurred in the grocery market. The plaintiffs were not competitors, participants, or consumers in that relevant market. In fact, the plaintiffs' connection to Fleming arose only from the plaintiffs' close physical proximity to Fleming's leased space in Ruskin Center. Although the plaintiffs may have been injured by Fleming's

failure to keep an anchor tenant in its leased space, the injury did not arise from anticompetitive activity in an economic market in which plaintiffs participated. *See id.* at 489-90.

The plaintiffs try to distinguish *Henke Enterprises, Inc.* by arguing the relevant market here was the "attraction of consumers." The plaintiffs, however, refer to no persuasive authority to support this broad definition of the relevant market. In addition, if this court were to accept the plaintiffs' market definition, we would expand the scope of the private antitrust action far beyond its intended bounds. A private antitrust action is not available to remedy every injury suffered by a player in the general economy. *See Associated Gen. Contractors*, 459 U.S. at 535-36. Rather, to maintain a private antitrust action, a party's claimed injury must be sufficiently linked to the procompetitive policies underlying the antitrust laws. *See Henke Enters., Inc.*, 749 F.2d at 490; *see also id.* at 489.

As in *Henke Enterprises, Inc.*, the plaintiffs have not suffered an antitrust-type injury and thus do not have standing to sue under the federal antitrust laws. *Id.* at 489-90; *see Midwest Communications, Inc. v. Minnesota Twins, Inc.*, 779 F.2d 444,450 n.6 (8th Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986); *see also General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 809 (8th Cir. 1987). Further, we agree with the district court that the plaintiffs also lack standing to sue on their state antitrust claims. *See* Mo. Ann. Stat. § 416.141.

We now turn to the summary judgment issue. After reviewing the record and the applicable legal principles, we conclude the district court properly granted summary judgment in favor of the defendant on the plaintiffs' state tort claims. *See Celotex Corp.*, 477 U.S. at 322-23.

The district court's decisions are well reasoned. We affirm. *See* 8th Cir. R. 14.

A true copy.

(Filed May 7, 1986)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 86-0161-CV-W-6
No. 86-0371-CV-W-6
(Consolidated)

RUSKIN CENTER SALON, et al.,
Plaintiffs,
v.
FLEMING COMPANIES, INC.,
a corporation,
Defendant.

MEMORANDUM AND ORDER

A motion to dismiss pending in the above-captioned antitrust actions is governed by the Eighth Circuit decision in *Henke Enterprises, Inc. v. Hy-Vee Food Stores,* 749 F.2d 488 (1984). The holding in that case that plaintiff-tenant in a retail shopping center did not have standing under the Sherman Act to bring a private action against defendant grocery store is directly on point with the present suit. Plaintiffs here are various tenants at the Ruskin Heights Shopping Center in Kansas City, Missouri, who are complaining of defendant Fleming Companies, Inc.'s actions after it was assigned the lease for the anchor tenant's premises in

1982. According to plaintiffs' pleadings,[1] the Ruskin Heights Shopping Center is only four city blocks from the Longview Shopping Center and the two establishments are direct competitors. In 1979, pursuant to a ten-year lease, the Great Atlantic and Pacific Tea Company (A&P) began operating a grocery store in the anchor or magnet location at the Ruskin Heights Center. Defendant Fleming, on the other hand, is alleged to be in the business of selling products at wholesale to the anchor or magnet tenant at the Longview Shopping Center — another grocery store. In the spring of 1982, apparently in connection with defendant's purchase of several A&P stores, Fleming became the assignee to A&P's lease in the Ruskin Heights Center. "Thereby defendant acquired monopoly and economic power in the relevant product and geographic market by control of the essential facility in the Ruskin Heights Shopping Center." Complaint, Case No. 86-0161, at p.9. From the date of the assignment until the date the suits were commenced, defendant has not reopened the grocery store at the Ruskin Heights location. Instead, it is alleged that Fleming has refused to either reopen the store or to negotiate with a third party to assume operation of the anchor premises *and* has placed a sign on the closed store directing customers to the grocery store at the Longview Shopping Center. These acts are described as anticompetitive and as causing private injury to the other tenants of the Ruskin Heights Center. Specifically, "[b]y not leasing (rent-

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[1] Case No. 86-0161 was filed originally in this court and states claims under the Sherman Act. Case No. 86-0371 was a state court petition filed by the same plaintiffs alleging state antitrust and common law claims against Fleming. Fleming removed this petition to federal district court with subject matter jurisdiction premised on diversity of citizenship. The two actions were consolidated by order dated April 5, 1986, because "both cases apparently concern identical facts but present different theories of liability."

ing) the vacated retail space to a viable anchor or magnet retail establishment, the Ruskin Heights Shopping Center is prevented from offering a full cluster of retail goods and services and is thereby deprived of the synergistic benefit of a shopping center location." *Id.* at p.11. Injunctive relief and damages are sought under both §§ 1 and 2 of the Sherman Act, 15 U.S.C. § 1 et seq. and the Missouri antitrust laws, RSMo. 416.031 et seq.

The *Henke* decision addressed an almost identical factual situation. Prior to November 1979, a Des Moines shopping center consisted of an anchor tenant grocery store and the plaintiff hardware store. The grocery store subsequently relocated to a nearby shopping center and assigned its space in the other center to a third party who agreed to refrain from leasing or subleasing the property "for the purposes of any general retail food store." Plaintiff hardware store's antitrust complaint alleged that defendant grocery store's actions constituted an unreasonable restraint of trade in violation of the Sherman Act. While acknowledging that the plaintiff was injured by defendant's efforts to prevent other food stores from operating at the first center, the Eighth Circuit agreed with the district court that the hardware store tenant had no standing to bring a private antitrust action. Plaintiff was neither a competitor, participant nor consumer within the retail grocery market; it did not suffer the kind of injury "that the antitrust laws were intended to prevent." 749 F.2d at 489. Moreover, plaintiff's damages attributable to defendant's anticompetitive conduct were "too speculative and uncertain to confer standing" since there may be a number of reasons why business at a particular shopping center decreases during a certain period of time. In sum, plaintiff was held to be an inappropriate party to maintain the antitrust action because of "the lack of antitrust-type injury, the presence of more

appropriate parties, and the speculative nature of Henke's injuries." *Id.* at 490.

Plaintiffs here attempt to distinguish *Henke* on the basis that, in the present suit, the defendant did not relocate to another location but simply closed operations altogether at the Ruskin Heights Shopping Center. This factual distinction, however, has no bearing on the relationship of the injuries suffered by the tenants to the allegedly anticompetitive activities of the defendant in keeping the anchor location closed. As in *Henke*, plaintiffs in the present case are not competitors, participants, or consumers within the grocery business. "The only significant connection" between the plaintiff-tenants and the former A&P store "was one of proximity." *Henke*, 749 F.2d at 490. *Henke* is dispositive of plaintiffs' Sherman Act claims here and, therefore, dismissal under F.R.Civ.P. 12(b)(6) is required.[2]

The state law antitrust claims must also be dismissed under the *Henke* rationale. *See* RSMo. 416.141 ("Sections 416.011 to 416.161 shall be construed in harmony with ruling judicial

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[2] The court notes that an earlier suit was brought in this district by the owners of the Ruskin Heights Shopping Center against Fleming, asserting that Fleming had an agreement with the operator of the grocery store in the Longview Shopping Center to protect the latter's business by refusing to rent the leased premises in the Ruskin Heights location to a competing grocery store. Judge Clark dismissed this action (involving the same facts but different plaintiffs than the present suit) for lack of standing. Relying on a Sixth Circuit decision with facts "strikingly similar to the case at bar," *Southhaven Land Company, Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (1983), Judge Clark concluded that "[t]he complaint fails to aver that plaintiffs sustained any injury as competitors, purchasers, consumers or other economic actors in the grocery industry." *Block v. Fleming Companies, Inc.*, No. 83-0582-CV-W-4, slip op. (W.D.Mo. November 2, 1983).

interpretations of comparable federal antitrust statutes."). The petition in Case No. 86-0371 also includes common law claims for tortious interference with contract (Count III) and prima facie tort (Count IV). These counts presumably have an independent basis for subject matter jurisdiction — diversity of citizenship. Defendant Fleming is an Oklahoma corporation that removed the state court petition on the basis of diversity. Fleming's pending motion does not address these common law counts. While the court has some doubt about the applicability of these theories to present alleged facts, no antitrust standing barrier exists as to these claims. Accordingly, it is hereby

ORDERED that all counts in Case No. 86-0161 (Sherman Act) and Counts I and II in Case No. 86-0371 (Missouri antitrust statutes) are DISMISSED because plaintiffs lack standing to bring these claims. It is further

ORDERED that defendant is directed to timely answer or otherwise respond to Counts III and IV of the petition in Case No. 86-0371 (tortious interference with contract and prima facie tort).

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: May 7, 1986.

(Filed April 27, 1987)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 86-0371-CV-W-6

RUSKIN CENTER SALON, et al.,
Plaintiffs,

v.

FLEMING COMPANIES, INC.,
Defendant.

ORDER

Plaintiffs in this action are various tenants in the Ruskin Heights Shopping Center. Defendant Fleming Companies, Inc. (Fleming) is the assignee of the lease of the premises formerly occupied by the center's one-time "anchor tenant," the A&P store. Since 1982, when it became A&P's assignee as part of a package purchase of several A&P stores, defendant Fleming has paid the rent on the Ruskin Center lease but has neither operated a business in that space nor sublet the space to any other business. Plaintiffs have brought suit against Fleming, alleging that Fleming's decision to maintain this space without an anchor tenant is prima facie tortious conduct and constitutes, additionally, a tortious interference with their valid business relationship (presumably with the lessor) or expectancy that an anchor tenant would remain in

the center.[1] Now pending before the court is defendant's motion for summary judgment on Counts III and IV.

ARGUMENTS

Defendant supports its motion for summary judgment on Count III, plaintiffs' claim of tortious interference with business relationship or expectancy, by arguing that plaintiffs had, at best, a hope that their landlord would maintain an anchor tenant in the center, as there is no such provision in any of the parties' leases. A hope is not a legally protected expectancy, it asserts. Fleming further argues that even if there was a legally cognizable expectancy, Fleming did not know of it at the time the decision was made to keep the space vacant. At the earliest, Fleming argues, it learned of the expectancy when the lessor filed suit against it in 1983 based on these same facts.[2] Therefore, it could have had no intention of interfering with plaintiffs' relationship with lessor or their expectancy when its decision was made. In any event, Fleming contends that it was justified in its actions because they were prompted by its own valid financial interests. Defendant points out that it is not required by its lease to maintain a business in the leased premises. Further, by affidavit of Byron Duffield, who was president of defendant's Kansas City division at the time the decision was made not to reopen the grocery store after A&P's departure, defendant

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[1] On May 7, 1986, the court dismissed plaintiffs' claims of state and federal antitrust law violations under Counts I and II of the complaint, due to plaintiffs' lack of standing to bring the claims. Remaining are Count III for tortious interference with contract or business relationship or expectancy and Count IV for prima facie tort.

[2] *Block v. Fleming Companies, Inc.*, No. 83-0582-CV-W-9 (W.D. Mo. filed May 20, 1983).

informs the court that a detailed analysis of the financial prospects of a continuing grocery operation there was made prior to its closure. That analysis revealed, in sum, that Fleming's short term rent losses "until [the] space was sublet" would be less than the losses in accounts receivable and note financing which it could expect if the grocery were to remain open under new owners. Defendant's Motion for Summary Judgment, Exhibit A. Plaintiffs themselves have submitted supplemental interrogatory answers which detail defendant's efforts to sublet the premises to other tenants. Plaintiffs' Suggestions in Opposition to Defendant's Motion for Summary Judgment, Exhibit B. The protection of its legitimate business interests, defendant argues, provides ample justification for its actions.

Plaintiffs respond that a protected expectancy need not be a contractual provision and that they had been assured by the landlord of a "continuously operating anchor or magnet tenant." Complaint at 13. They support this by their own deposition testimony and refer the court to their complaint for the facts supporting their allegations of tortious interference. Plaintiffs claim that the filing of the lessor's suit in May 1983, served as notification of their expectancy of a continuing relationship. They press for a finding of constructive intent, since the harm plaintiffs allege is the "necessary and direct consequence" of defendant's acts which were "manifestly likely" to cause them damage. Suggestions in Opposition at 7. Finally, plaintiffs contend that the question of justification for defenant's actions may not be judged from defendant's own subjective view of its best financial interests but is an issue to be objectively determined, taking into account the societal effects of defendant's conduct:

> The issue in this matter is not Defendant's obligations under the lease nor Defendant's perception of what is in the best financial interest. The issues are whether Defen-

> dant's subsequent conduct, particularly as it effects [sic] third parties, such as consumers and retail businesses, is societally acceptable. . . .

Suggestions in Opposition at 12.[3] Plaintiffs contend that defendant's actions reduced competition and "impaired consumer preference" and that its acts were an "unlawful restraint of trade."

In support of its motion for summary judgment on Count IV, plaintiffs' claim of prima facie tort, defendant contends that it intended no injury to plaintiffs and that its actions were justified, being taken strictly for legitimate business purposes. Defendant points out that plaintiffs have not adduced any evidence to support their contention that defendant indended to injure them and in fact admit in deposition that they have no such evidence. Motion for Summary Judgment at 7.

Plaintiffs respond once again that defendant's intent may be inferred because "defendant is charged with the intent for the end result which is the necessary and direct consequence of his conduct." Suggestions in Opposition at 11. Both parties repeat here their earlier justification arguments.

LEGAL STANDARDS

The standards for summary judgment have recently been elucidated by the United States Supreme Court:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered

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[3] Specifically defendant's subsequent conduct plaintiffs complain of was its insistence upon a dismissal of the lessor's lawsuit against it arising from these same facts in return for its surrender of the leasehold to the lessor.

> forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."
>
> . . .
>
> In essence . . . the inquiry . . . [is] whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511-12 (1986).

> The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986). Such a showing

> requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Id.

In considering the facts and arguments set out above in the light of these standards, the court finds that the evidence is so one-sided in this case as to require that defendant must prevail; summary judgment is appropriate and will be granted on both counts.

TORTIOUS INTERFERENCE WITH CONTRACT OR BUSINESS RELATIONSHIP OR EXPECTANCY

The elements which plaintiffs must prove in order to succeed on their claim of tortious interference are (1) a contract, or valid business relationship or expectancy; (2) defendant's knowledge of the contract or relationship; (3) intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; (5) damages resulting from defendant's acts. *Institutional Food Marketing v. Golden State Strawberries*, 747 F.2d 448 (8th Cir. 1984) (construing Missouri law). Although the court has serious doubts about other elements of plaintiffs' case, it will address only the issue of justification, since the failure of the action as to this element alone spells failure for the entire theory.[4]

The burden of proving an absence of justification is borne by plaintiff. *Francisco v. Kansas City Star Co.*, 629 S.W.2d 524 (Mo. Ct. App. 1981). These plaintiffs do not contest defendant's factual claim that it acted in its own financial interests but argue that this motive cannot provide a basis for a finding of justification.

Plaintiffs' argument that defendant's acts are unjustified because they violated the Sherman Antitrust Act must be rejected. Plaintiffs' claims based on antitrust violations were

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[4] For instance, given the fact that the relationship between each of the plaintiffs and their landlord-lessor was governed by contract, none of which provided for the continuous presence of an anchor tenant, the court questions whether plaintiffs' expectation that such a tenant would always remain rises to the level of a valid expectation which the law will protect. While it is true that relationships may be protected in the absence of a contract, it is presumed that where a contract does exist, its terms will contain all the duties and benefits obtaining between the parties.

dismissed from this suit several months ago and clearly cannot be determined on this motion. Thus, they cannot serve as a basis for a claimed lack of justification.

Plaintiffs' argument that defendant's acts must be judged objectively, so as to coincide with society's best interests, is without merit. Missouri courts have held that "where one has a bona fide legal economic interest to protect, that party is privileged to prevent performance of a contract which threatens that bona fide legal economic interest." *Francisco,* 629 S.W.2d at 534; *Solomon v. Crown Life Insurance Co.,* 536 F.2d 1233 (8th Cir. 1976), *cert. denied,* 429 U.S. 961 (1976); *see also Minnesota Mining & Manufacturing Co. v. Williamson,* 675 S.W.2d 951 (Mo. Ct. App. 1984); *Pillow v. General American Life Insurance Co.,* 564 S.W.2d 276, 282 (Mo. Ct. App. 1978). While the law recognizes an exception to this rule for behavior that is inherently improper, there is a complete lack of evidence of such behavior in this case. Defendant was performing according to the terms of its own lease, which specifically allowed it to keep the premises vacant. Plaintiffs have failed to carry their burden of proof as to this necessary element of their cause of action for tortious interference with contract or business relationship.

PRIMA FACIE TORT

Similarly, plaintiffs' claim of prima facie tort must fail. The elements which constitute plaintiffs' burden of proof on this claim are (1) an intentional lawful act by defendant; (2) defendant's intent to cause injury to plaintiff; (3) actual injury to plaintiff; (4) absence of any justification or insufficient justification for defendant's act. *Porter v. Crawford & Co.,* 611 S.W.2d 265 (Mo. Ct. App. 1980). As plaintiffs failed to carry their burden of proof on the issue of lack of justification for tortious interference with contract, so they have

failed to carry their burden on this theory of recovery, and for the same reasons. Further, although, as plaintiffs suggest, intent may sometimes be inferred from the fact that a tortfeasor is held to account for the natural and probable consequences of his actions, Missouri law as to this particular tort is to the contrary; the intent must be specific. *Rooney v. National Super Markets, Inc.*, 668 S.W.2d 649 (Mo. Ct. App. 1984); *Bandag of Springfield, Inc. v. Bandag, Inc.*, 662 S.W.2d 546 (Mo. Ct. App. 1983) ("Inasmuch as the record shows beyond cavil that the defendant has only a profit motive . . . the element of intentionally seeking to injure plaintiffs, essential to a cause of action for prima facie tort, is lacking."). Plaintiffs have failed to produce any evidence whatever that defendant intentionally acted to injure them. Summary judgment on this count is appropriate, as well. It is, therefore,

ORDERED that defendant's motion for summary judgment on Counts III and IV is GRANTED.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: 4-27, 1987.

RULE 28.1 DISCLOSURE

Pursuant to Rule 28.1 of the Supreme Court Rules, Fleming Companies, Inc. states that it has no parent company, and, except for the following, all subsidiaries are wholly owned. The following companies are local grocery stores in which Fleming shares equity ownership with the local owner:

B.S.D., Inc.
Hudson Drive &
Graham Rd.
Stow, Ohio 44224

Bauersfeld Enterprises, Inc.
10th & Gage Blvd.
Topeka, Kansas 66604

Blake & Ellis, Inc.
1517 Hawthorne N.E.
Salem, Oregon 97301

Mr. C's Food Corp.
407 12th Ave.
Nampa, Idaho 83651

C.V.'s Family Food, Inc.
421 West Centennial
Carhage, Missouri 64836

Choice IGA, Inc.
1107 Berryville Ave.
Winchester, Virginia 22601

Idaho Falls Food Corp.
1530 E. 17th Street
Idaho Falls, Idaho 83401

L-C Foods, Inc.
1915 E. Pawnee Street
Wichita, Kansas 67211

Lynwood Food Corp.
1147 Filer Avenue
Twin Falls, Idaho 83301

Moberly Foods, Inc.
Bus. Rt. 63 & Highway 24
Moberly, Missouri 65270

Montpelier Food Corp.
130 South 4th Street
Montpelier, Idaho 83254

Davis/Burkett Food Corp.
575 W. Main
Vernal, Utah 84078

Great Bend
Supermarkets, Inc.
1809 24th Street
Great Bend, Kansas 67530

Hahncor, Inc.
Southern & Val Vista
Mesa, Arizona 85204

Harber's Thriftway, Inc.
26th & Main
Joplin, Missouri 64801

Hillcrest Foods, Inc.
9th and Iowa
Lawrence Kansas 66044

Noland Road Foods, Inc.
14121 E. 40 Hiway
Kansas City, Missouri 64136

Nowell's on Nifong, Inc.
Providence & Nifong, N.E.
Columbia, Missouri 65201

RULE 28.1 DISCLOSURE — (Continued)

Ogden Food Corporation
851 24th Street
Ogden, Utah 84403

P and J, Inc.
2311 West Willow
Enid, Oklahoma 73701

Quail Valley Market, Inc.
2601 Cartwright
Missouri City, Texas 77459

Moore's IGA, Inc.
11th & Mekusukey
Wewoka, Oklahoma 74884

Raytown United Super, Inc.
5210 Blue Ridge Blvd.
Raytown, Missouri 64133

Ridley's Food Corporation
233 W. Main
Jerome, Idaho 83338

Riley's Foods
Spanish Fort, Inc.
Hwy 90 & 98 N.E.
Spanish Fort, Alabama 36527

Rose Park Food Corp.
729 Redwood Road
Salt Lake City, Utah 84118

Rusov, Inc.
619 & S. Main
Akron, Ohio 44319

S & J Reed, Inc.
2268 Ashland
Ashland, Oregon 87520

Warrendale, Inc.
2540 East Broadway
Pearland, Texas 77581

West Valley Food Corp.
3765 S. 2700 West
Salt Lake City, Utah 84119

Mill Creek Foods, Inc.
13320 W. 262nd Terrace
Shawnee, Kansas 66216

Southern Utah Food Corp.
410 S. Main
Cedar City, Utah 84720

Spence, Inc.
Rt. 17
Gloucester, Virginia 23061

Switzer Foods, Inc.
10118 W. 119th Street
Overland Park, Kansas 66212

Twin Falls Food Corp.
512 Main Ave., North
Twin Falls, Idaho 83301

Wardway Enterprises, Inc.
322 Battlefield Rd.
Chesapeake, Virginia 23320

Weiser Food Corporation
652 First St.
Weiser, Idaho 83672